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87-841

No. 87-

In The Supreme Court of the United States

October Term, 1987

STATE OF MISSISSIPPI

PETITIONER

VERSUS

DANNY RAY DAVIS

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE MISSISSIPPI SUPREME COURT

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QUESTIONS PRESENTED

1. Whether it is a violation of the Sixth Amendment to the Constitution to allow a person who previously testified on behalf of the State at a change of venue hearing to serve as a member of the petit jury where there is no showing or attempt to show actual bias on the part of the juror. Further, such ruling is in conflict with the rulings of other state courts of last resort.

2. Whether this Court's prior decisions require that a defendant in a capital case be allowed to tell the jury in mitigation what sentence he received for a prior conviction which the State has used as an aggravating factor.

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NO. 87-_____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

STATE OF MISSISSIPPI
Petitioner

vs.

DANNY RAY DAVIS
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE MISSISSIPPI SUPREME COURT

Petitioner, State of Mississippi, respectfully prays that a Writ of Certiorari issue to the Mississippi Supreme Court to review that Court's decision in this cause rendered September 23, 1987.

OPINIONS BELOW

The opinion of the Mississippi Supreme Court is reported as Danny Ray Davis v. State, _____ So.2d _____ (Miss. 1987) (No.

DP-69, Decided September 23, 1987, not yet reported).[1] A copy of the opinion of the Mississippi Supreme Court is attached hereto as Appendix "A". The State did not seek a rehearing of this decision.

JURISDICTION

Petitioner, State of Mississippi invokes the jurisdiction of this Court by way of Petition for Writ of Certiorari under the authority of 28 U.S.C. §1257. The decision of the Mississippi Supreme Court was rendered September 23, 1987.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves Article III, §II, paragraph 3 of the Constitution which states:

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[1]All of the parties to this action are Danny Ray Davis and the State of Mississippi.

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Place as the Congress may by Law have directed.

Also involved is the Sixth Amendment to the United States Constitution, which states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Also involved is the Eighth Amendment to the United States Constitution which states:

> Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

A. Procedural History

Respondent, Danny Ray Davis, was indicted for the capital murder of Ralph May, by the Grand Jury of Tate County, Mississippi, pursuant to Mississippi Code Ann. §97-3-19 (2) (e) (1972, as amended).

After pre-trial matters were heard, a jury was impaneled for the guilt/innocence phase under Mississippi's bifurcated capital trial scheme. Miss. Code Ann. §99-19-101 (1972, as amended) The jury found Davis guilty of capital murder.

The same jury heard additional evidence in the sentencing phase of the trial and returned with a determination that Davis should suffer the penalty of death. (§99-19-101, supra)

An automatic appeal to the Mississippi Supreme Court ensued. Miss. Code Ann. §99-19-105 (1972, as amended) The Mississippi Supreme Court issued its opinion on September 23, 1987, holding by a 6-3 vote that the conviction and sentence should be reversed because of errors in the jury selection process and because the trial court did not allow certain evidence in mitigation. [See App. "A"]

The State did not seek rehearing of the Mississippi Supreme Court's ruling. The State has now filed its petition for writ of certiorari to this Court.

B. Substantive Facts

The facts surrounding the actual murder of Ralph May are not in dispute at this point. The decision of the Mississippi Supreme Court was based entirely on two points of law not related to the facts of

the murder. Thus only such facts as related to those legal points at issue will be discussed.

The defendant filed a motion for change of venue in this cause citing adverse pre-trial publicity. On October 9, 1985, the trial court held a hearing on the matter. At this hearing Mr. Benjamin Delap was one of the witnesses subpoenaed at random by the State to testify. He testified essentially that he knew nothing about the case and that Davis could receive a fair trial. [See, Appendix "B"]. Mr. Delap was later selected as one of the members of the petit jury to try the case. During voir dire, none of his responses indicated any bias on his part either for or against the defendant. [See Appendix "C"]. After the jury had been impanelled and sworn, but prior to the introduction of any

testimony or evidence, counsel for defense moved for a mistrial and/or to have Mr. Delap stricken from the panel. The Court conducted a hearing on the issue, after which the Court denied the request for mistrial and to strike juror Delap. The hearing and ruling by the Court are set forth as Appendix "D" attached hereto. Specifically, the defense declined to call juror Delap to determine any actual bias on his part. [App. D., p. 57]

The Mississippi Supreme Court on direct appeal determined that allowing juror Delap to serve on the petit jury was a violation of the defendant's Sixth Amendment right to an impartial jury. This issue is therefore properly preserved in the record both the trial and appellate levels, giving this Court jurisdiction to review it on this petition.

The second matter at issue here is the disallowance by the trial court to certain matters in mitigation at the sentencing phase. The State had introduced, as an aggravating factor, the fact that Davis had previously been convicted of aggravated assault in DeSoto County, Mississippi in 1985. The defendant later sought to introduce a sentencing order showing that the defendant had been sentenced to a term of twenty years on that conviction. [See Appendix "E"]. The trial court held that such information was not relevant in mitigation and denied the request to submit such information to the jury.

The Mississippi Supreme Court held that the information regarding the sentence should have gone to the jury and in essence that the failure to allow this issue to go to the jury resulted in a violation of the

Eighth Amendment. This issue was therefore ruled on in a timely fashion in both the trial and appellate courts of Mississippi and thus subject to review in this Court.

REASONS FOR GRANTING THE WRIT

A. The Writ Should be Granted to Correct An Erroneous Determination by the Mississippi Supreme Court Under the Sixth Amendment

The Mississippi Supreme Court erroneously held that under the Sixth Amendment, Mr. Benjamin Delap should not have been allowed to sit on the petit jury which found Danny Ray Davis guilty of capital murder and sentenced him to death. Prior to trial, Mr. Delap had been called by the State as a witness at a change of venue hearing. The Mississippi Supreme Court determined that even though there was absolutely no showing whatsoever of any prior knowledge of the case (other than the

change of venue hearing) on Mr. Delap's part, that the trial was unfair.[2] This is simply not the law.

The Sixth Amendment to the United States Constitution reads, in pertinent part, that:

> In all criminal prosecutions, the accused shall enjoy the right to a

---

[2]This finding is obviously based on a Constitutional consideration as the Mississippi Supreme Court in no way implied that Mr. Delap was incompetent under Mississippi statutes. In fact, it is patently evident that Mr. Delap was competent under Mississippi statutes. See generally, Miss. Code Ann. §§13-5-1, 13-5-79 (1972) Further, while petitioner contends that the ruling by the Mississippi Supreme Court is clearly based on the Federal Constitution, if not, the most that could be said is that any state constitutional ground is "interwoven" with the federal basis, and thus this Court may review this issue. Caldwell v. Mississippi, 472 U.S. 320, 327, 105 S.Ct. 2633, 2638-2639, 86 L.Ed.2d 231, 238 (1935).

> speedy and public trial, by an impartial jury...

The amendment makes no attempt to define what an impartial jury means, but this Court has said that an "impartial" jury consists of "...jurors who will conscientiously apply the law and find the facts". Wainwright v. Witt, 469 U.S. 412, 423, 105 S.Ct. 844, 83 L.Ed.2d 841, 851 (1985). Thus, any criminal trial "begins" with a quest for such a jury.

The Sixth Amendment lays down no particular tests or procedures for determining juror competency. Frazier v. United States, 335 U.S. 497, 511, 69 S.Ct. 201, 209, 93 L.Ed. 187, 198 (1948); United States v. Wood, 299 U.S. 123, 145-146, 57 S.Ct. 177, 185, 81 L.ED. 78, 88 (1936). In Wood, supra, relating to government employees, the Court said:

> Why should it be assumed that a juror, merely because of employment by the Government, would be biased against the

> accused? In criminal prosecutions the Government is acting simply as the instrument of the public in enforcing penal laws for the protection of society. In that enforcement all citizens are interested. It is difficult to see why a governmental employee, merely by virtue of his employment, is interested in that enforcement either more or less than any good citizen is or should be.
>
> [299 U.S. at 149]

Petitioner respectfully suggests that the same rationale applies here. While Mr. Delap did testify at the change of venue hearing, nothing in his testimony there or on voir dire indicates any bias, prejudice or other predisposition in this case. Instead, the majority of the Mississippi Supreme Court finds Mr. Delap presumptively biased. Petitioner's agree with Justice Hawkins' dissent that if this is the case "... then we have indeed wandered into fairyland." __ So.2d at __, App. A. at 11

Here Mr. Delap, acting as a good citizen should, responded to his summons to appear at the change of venue hearing and jury selection, answered all of the questions put to him forthrightly, rendered his jury service and now is told that in so doing he denied the defendant his Sixth Amendment rights. All, if anything, that Mr. Delap did wrong was testify that the defendant could receive a fair trial and that he would fairly judge the case based on the testimony and evidence presented to him. If this disqualifies a person as a juror, then one must ask the rhetorical question, who is qualified to serve?

In order to be competent to serve as a juror, one need not be totally ignorant of the facts of the case. In Irvin v. Dowd, 366 U.S. 717, 722-723, 81 S.Ct. 1639, 6 L.Ed.2d 751, 756 (1961) it was stated:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. Spies v. Illinois, 123 US 131, 31 L.Ed. 80 S.Ct. 21, 22; Holt v. United States, 218 US 245, 54 L.Ed. 1021, 31 S.Ct. 2, 20 Ann Cas 1138; Reynolds v. United States, (US) supra.

The Court went on to state that the test is "whether the nature and strength of the opinion formed are such as in law necessarily ... raise the presumption of

partiality." 366 US at 723, quoting Reynolds v. United States, 98 US 145, 156 (1878). In Murphy v. Florida, 421 U.S. 794, 799, 95 S.Ct. 2031, 44 L.Ed.2d 589, 594 (1975), the Court discussed Irvin v. Dowd, supra and its progeny, and stated in regard to these cases that:

> They cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process. To resolve this case, we must turn, therefore, to any indications in the totality of circumstances that petitioner's trial was not fundamentally fair.

See also, Dobbert v. Florida, 432 U.S. 282, 302-303, 97 S.Ct. 2290, 2303, 53 L.Ed.2d 344, 361-362 (1977). The case at bar should have been judged under this "totality of the circumstances" test. Had this been done, Mr. Delap was obviously a qualified juror.

The burden is on the challenger to show that the potential juror is not impartial. In Wainwright v. Witt, 469 U.S. 412, 423-424, 105 S.Ct. 844, 83 L.Ed.2d 841, 851 (1985), it was stated:

> As with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality. See Reynolds v. United States, 98 US 145, 157, 25 L.Ed. 244 (1878). It is then the trial judge's duty to determine whether the challenge is proper. This is, of course, the standard and procedure outlined in Adams, but it is equally true to any situation where a party seeks to exclude a biased juror. See, e.g., Patton v. Yount, 467 US 1025, 1036, 81 L.Ed.2d 847, 104 S.Ct. 2885 (1984) (where a criminal defendant sought to excuse a juror for cause and the trial judge refused, the question was simply "did [the] juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestations of impartiality have been believed"). [Emphasis added]

There is no more reason to presume that the juror in this case would be prejudiced than any other person, even those more intimately associated with the State than was Mr. Delap. See, e.g., the illustrative list in footnote 9 of United States v. Wood, 299 US at 140. In fact, the Mississippi Supreme Court itself has held that a member of the grand jury which indicted a defendant is not presumptively disqualified as a potential petit juror. Ratcliff v. State, 197 Miss. 289, 20 So.2d 69 (1944). A grand juror is surely more likely to be biased than someone who has heard nothing about the case, as Mr. Delap. In the final analysis, "Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial." Batson v. Kentucky, 476 U.S.__, 106 S.Ct.__,

90 L.Ed.2d 69, 81 (1986). "Impartiality is not a technical conception. It is a state of mind." United States v. Wood, supra, 299 U.S. at 145. The defendant made absolutely no attempt to show bias or prejudice on the part of juror Delap, even when specifically invited to do so. [App. D, p. 57] Indeed, In Smith v. Phillips, 455 U.S. 209, 215, 102 S.Ct. 940, 71 L.Ed.2d 78, 85 (1982) this Court held:

> ... that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias.

This is precisely what the trial court did, and came to the conclusion that juror Delap was qualified to serve. For the Mississippi Supreme Court to hold that juror Delap's service violates the Sixth Amendment under these circumstances is clearly erroneous.

Indeed, while there is a decided scarcity of cases which have discussed this exact point, the ruling of the Mississippi Supreme Court may be unique in the annuals of American and English jurisprudence. Petitioner has found no federal cases directly on point, but at least six other states have decided this issue contrarily to the position of the Mississippi Supreme Court. Singer v. State, 109 So.2d 7, 18 (Fla. 1959); State v. Sheffield, 232 La. 53, 93 So.2d 691 (1957); State v. Langhams, 94 N.J.L. 17, 110 A. 566 (1920); State v. Morse, 35 S.D. 18, 150 N.W. 293 (1914); Hardin v. State, 40 Tex. Cr. 208, 49 S.W. 607 (1899); State v. Wisdom, 84 Mo. 177 (1884). Also, one state has held that a defendant is not denied a fair trial when one of the petit jurors is actually sworn and testifies at trial. Tumlin v. State, 88

Ga. App. 713, 77 S.E.2d 555, 556 (1953). See also 50 C.J.S. Juries §209 (1947). In fact, in Langhams the court reversed because the trial court sustained a challenge for cause by the State to a juror who had been summoned by the State as a witness. The court further noted that the Common Law of England did not disqualify a juror because he had been summoned as a witness citing, Rex v. Rosser, 7 Car. & Payne 648, 173 Eng. Rep. 284 (1836). With this in mind, it is strange that the Mississippi Supreme Court would hold that the "... unsuitability of such a person for that position [juror] is obvious." __ So.2d at __, App. A., p. 6. It had certainly not been obvious for hundreds of years of previous American and English jurisprudence, and certainly was not obvious to Justice Hawkins and two other members of

the Mississippi Supreme Court. ___So.2d at __, App. A, pp. 9, 19.

This Court has consistently disfavored implied bias of jurors, and favored a hearing to determine actual bias. See, Smith v. Phillips, supra. In Smith the Court stated:

> These cases demonstrate that due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as voir dire and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in Remmer and held in this case.
> [455 U.S. at 217]

In the final analysis, juror Delap should have been judged as any other juror, i.e. whether he displayed any actual bias or prejudice against the defendant or in favor of the state. The holding of the Mississippi Supreme Court does nothing to aid the reliability of the jury verdict, but only serves to undermine the already shaky confidence which the public has in the court system. Also, Batson, supra, has taught that the harm from improper juror exclusion goes beyond inflicting harm on the defendant and improperly excluded juror, and touches the entire community. Batson, 476 U.S. at __, 90 L.Ed.2d at 81. For this reason, this Court should grant certiorari to correct the erroneous ruling under the Sixth Amendment by the Mississippi Supreme Court.

B. The Writ Should Be Granted to Correct the Mississippi Supreme Court's Erroneous Interpretation of What Constitutes Relevant Evidence In Mitigation in a Capital Case

At the sentencing phase of the trial, the defendant sought to introduce to the jury the fact that he had received a sentence of twenty years for the conviction of aggravated assault which was used as an aggravating factor by the prosecution. The trial court held that the sentence received was not relevant in mitigation and declined to allow that information to go to the jury. On appeal, the Mississippi Supreme Court reversed, holding that they could not say it was irrelevant. Petitioner contends that this holding is a misinterpretation of this court's holding in McClesky v. Kemp, ___U.S. ___, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); Skipper v. South Carolina, 476 U.S. ___, 106 S.Ct. ____, 90 L.Ed.2d 1 (1986);

Eddings v. Oklahoma, 455 US 104, 71 L.Ed.2d 1, 102 S.Ct. 869 (1982); and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The clear impact of these cases is that the defendant may introduce virtually anything in mitigation, provided it is relevant to whether the death penalty should or should not be imposed. To deny such violates the Eighth Amendment. This does not mean that anything even remotely related to the defendants is "relevant" and thus admissible. See Skipper, supra, 90 L.Ed.2d at 8, fn. 2. Rule 401 of both the Federal Rules of Evidence and the Mississippi Rules of Evidence[3] state:

---

[3]We note that the Mississippi Rules of Evidence did not go into effect until January 1, 1986 and were not applicable to this trial, but this definition is offered to show that "relevance" does not differ in the state and federal forums.

> "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequences to the determination of the action more probable or less probable than it would be without the evidence.

Petitioner respectfully suggests that the fact that the defendant had received the maximum sentence for a prior crime (Miss. Code Ann. §97-3-7(2) 1972, as amended) does not fall under any definition of relavance in the context of mitigation. Refusal to allow this evidence to go to the jury most assuredly does not violate the Eighth Amendment. This Court has not countenanced "unfettered" submission to the jury in mitigation, but has ruled that only that which is relevant may be submitted. Balanced against this, is the factor that the jury should not be allowed in any way to shift the responsibility for their decision to anyone else. Caldwell v. Mississippi, 472 US 320, 86 L.Ed.2d 231, 105 S.Ct. 2633

(1985). This is clearly what was intended by introduction of this evidence. As noted by the Mississippi Supreme Court "It appears that the defense was trying to inform the jury that Davis would be subject to severe punishment even without the death penalty." ___ So.2d at___, App. A., p.8. This is a clear attempt to allow the jury to shift its responsibility.

From the other side of this coin, the Mississippi Supreme Court has held that the prosecution is not allowed to introduce the fact that a defendant has a prior sentence of death, because of the risk that it might tend to allow the jury to shift their responsibility to others. West v. State, 463 So.2d 1048, 1052-1053 (Miss. 1985); Williams v. State, 445 So.2d 798, 812 (Miss. 1984). The same concern holds true for a non-death sentence situation.

Petitioner has not found any case, state or federal which deals with this issue where the sentence in dispute is less than death. This is probably because of the fact that, as the Mississippi Supreme Court noted, "... it is highly unusual for a defense counsel to cite the existence of another prison sentence as a mitigating factor (indeed, we have never heard of it being done before)". ___ So.2d at___, App. A. p. 8. It is highly probable that this is a case of first impression for this or any federal court.

The final analysis, however, is that the sentence which a defendant has received on a prior conviction is simply not relevant to the "... defendant's character or record and any of the circumstances of the offense." Lockett v. Ohio, supra, 438 U.S. at 604. It would only serve to sway the

jury away from its responsibility in sentencing, and in fact is as likely to sway the jury toward death as it is away from it. This Court should grant certiorari on this issue to correct the Mississippi Supreme Court's erroneous ruling in this regard.

CONCLUSION

For the above stated reasons, petitioner prays that a writ of certiorari issue to the Mississippi Supreme Court and that this Court reverse the ruling of the Mississippi Supreme Court and reinstate the conviction and death sentence in this cause.

Respectfully submitted,

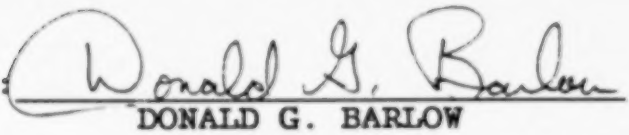
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CERTIFICATE OF SERVICE

I, Donald G. Barlow, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing Petition for Writ of Certiorari to the following:

Honorable Robert G. Gilder
Post Office Box 190
Southaven, Mississippi 38671

This the 4th day of November, 1987.

Donald G. Barlow
DONALD G. BARLOW

IN THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

NO. DP-69

DANNY RAY DAVIS

V.

STATE OF MISSISSIPPI

EN BANC

ANDERSON, JUSTICE FOR THE COURT:

This is an appeal from the Circuit Court of Tate County, wherein the appellant, Danny Ray Davis, was convicted of capital murder and sentenced to death.

On April 2, 1985, the body of Ralph May, a retired resident of the Arkabutla community in Tate County, was found in a garbage dump near Coldwater. His death was caused by a single .25 caliber gunshot wound to the base of his head. Several passersby had noticed a man fleeing the site in apparent haste on a motorcycle.

Investigation placed suspicion upon Danny Ray Davis. Local police, cooperating with the Tate County authorities, arrested Davis at his home in Memphis. Davis' sister turned a .25 pistol over to the police. Tests by the Mississippi Crime Lab established that this weapon had killed Ralph May. A DeSoto County pawnbroker stated that he had sold the gun and ammunition to Davis.

Davis was indicted for capital murder and tried in the Circuit Court of Tate County. The jury found him guilty. In the penalty phase of the bifurcated trial, the jury found the following aggravating circumstances: (1) that the murder was committed during the commission of a crime, to-wit robbery; (2) that the murder was committed in order to prevent or avoid arrest; (3) that the murder was committed

for pecuniary gain; (4) that the murder was especially heinous, atrocious or cruel and (5) the defendant had been previously convicted of a felony involving the use or threat of violence. The jury found that these outweighed any mitigating circumstances, and sentenced Danny Ray Davis to death.

We have carefully reviewed the assignments of error. Our discussion below concerns the ones we deem to have merit.

A pretrial motion for a change of venue having been made, the judge duly ordered a hearing. The state produced a number of witnesses attesting their belief that Davis could receive a fair trial in Tate County. After hearing the evidence from both sides, the trial judge announced himself satisfied that Davis could be fairly tried, and denied the defense motion.

One of the witnesses produced by the states at the change-of-venue hearing was Ben Delap, whose testimony would have attracted no particular notice but for an unusual later development: When, some four weeks later, voir dire was commenced for the trial proper, this same Delap was part of the venire. Oddly, neither the defense counsel not the trial judge remembered him from the pretrial hearing. Delap did not respond to voir dire questioning in such a way as to alarm anyone, and in the end he became a member of the petit jury panel.

Just before the opening statements, defense counsel suddenly realized where he had seen Delap before, whereon he made a motion for a mistrial, which the judge denied. Defense counsel then moved that the juror Delap be stricken and an alternate substituted. This motion was likewise

overruled, even though there were three alternate jurors available.

As the state correctly points out, our rule is that failure to object to the jury before it is empaneled waives any right to complain of its composition. Pickett v. State, 443 So.2d 796 (Miss. 1983); Watkins v. State, 262 So.2d 422 (Miss. 1972); Holloway v. State, 242 So.2d 454 (Miss. 1970). Today's unusual circumstances present a compelling case that we recognize an exception to that technical rule. Besides, all that had been done was that the jury had been empaneled and sworn. The trial proper had not yet begun. Furthermore, this record leaves us without doubt that defense counsel acted promptly once he realized that juror Delap had been a witness at the venue hearing.

Turning to the merits, we accept that in a death penalty case, "we must be vigilant that the jury ... is infected by not the slightest taint or suggestion of bias or unfairness." Fisher v. State, 481 So.2d 203, 216 (Miss. 1985). We find more than a "suggestion" of unfairness in the presence on the jury panel of one who had previously served as a witness for the state in the same case. The unsuitability of such a person for that position is obvious. It gives the whole trial an appearance of impropriety.

The evidence of Davis' guilt was strong. Nevertheless, even an obviously guilty criminal is entitled to a fair trial. Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751, 755 (1961); Coleman v. Kemp, 778 F.2d 1487, 1541 (11th Cir. 1985); Ferguson v. State, 507 So.2d 94,

97 (Miss. 1987). A trial before a jury, one of whose members has been a witness for the prosecution in a pretrial hearing, is by definition, not a fair trial.

There is a second reason for reversal. During the penalty phase of the trial, the defense attempted to introduce as a mitigating circumstance, evidence that Davis' prior conviction for assault had resulted in a prison sentence. The trial judge refused to admit the sentencing order.

The U. S. Constitution requires that defendants be given broad latitude in introducing evidence of mitigating circumstances. In a recent case, the Supreme Court remarked:

> The sentencer cannot be precluded from considering as a mitigating factor, any aspect of a defendant's character on record and any of the circumstances of the offense that the defendant

proffers as a basis for a sentence less than death.

> McClesky v. Kemp, ___U.S. ___, 107 S.Ct. 1756, 1773, 95 L.Ed.2d 262, 286 (1987), quoting Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973, 990 (1978).

This Court has been similarly soliticous, holding that Mississippi allows "evidence of mitigating circumstances of an unlimited nature." Leatherwood v. State, 435 So.2d 635, 650 (Miss. 1983). The use of such evidence is limited by only one restriction -- the evidence must be relevant. Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S.Ct. 869, 875, 71 L.Ed.2d 1, 9 (1982); Washington v. State, 361 So.2d 61, 68 (Miss. 1978).

While it is highly unusual for a defense counsel to cite the existence of another prison sentence as a mitigating factor (indeed, we have never heard of it being done before), we cannot say that it

was irrelevant. It appears that the defense was trying to inform the jury that Davis would be subject to severe punishment even without the death penalty. While this argument might not have swayed the jury, we do not feel entitled to say they should not have heard it.

Because of these errors, the case must be reversed and remanded for a new trial.

REVERSED AND REMANDED.

ROY NOBLE LEE, P.J., AND DAN LEE, PRATHER, ROBERTSON AND SULLIVAN, JJ., CONCUR.

WALKER, C.J., AND HAWKINS, P.J., AND GRIFFIN, J., DISSENT.

IN THE SUPREME COURT OF THE
STATE OF MISSISSIPPI
NO. DP-69

DANNY RAY DAVIS

V.

STATE OF MISSISSIPPI

HAWKINS, PRESIDING JUSTICE, DISSENT:

I respectfully dissent.

The majority is reversing this case for two vaporous reasons. I have never heard, until the majority enlightened me, that simply because some citizen of a county, knowing nothing about the parties or the facts of the case, is subpoenaed as a State witness on a defense motion for a venue change and asked whether the defendant can receive a fair trial in the county, and truthfully states he thinks he can, that this disqualifies him as a prospective juror.

What, I might inquire, disqualifies him? He did not know the victim. He had only heard about the killing the day it happened some six months previous. The facts of the case were not discussed at all in the change of venue hearing.

Then does the fact the State subpoenad him make a difference? The sheriff was asked by the district attorney to pick about six people from diverse points of the county to testify. Ben Delap was one of them. None of these witnesses was interviewed before taking the witness stand, and the district attorney therefore knew nothing about what any would testify. If this disqualifies a citizen otherwise manifestly qualified to serve as a juror, then we have indeed wandered into fairyland.

Ralph May was murder April 2, 1985. On October 9, 1985, the circuit judge conducted

a hearing on a motion for a change of venue filed by defense counsel for Davis. Eleven witnesses testified for the state, five of them county officials, and six picked at random from the county. One of these was Ben Delap.

Delap had lived in Tate County for approximately 20 years. He had been retired since 1981 from the automobile business in Memphis. All Delap knew about the slaying was that on the day May was killed he was stopped on the road where the body was found and asked if he had passed there about the time May was killed. After that he never heard the case discussed by any of the individuals outside his family he conversed with in the interim between the killing and hearing date. In his family the killing had "probably" been mentioned, but none of Delap's family knew the defendant.

He did not know the victim, he had heard nothing about the case, and until he was questioned at the venire hearing he did not even know who was accused of the killing. He testified he probably read something about the killing in the Commercial Appeal, but had no recollection of it. He did not subscribe to the county paper. He had never heard anything about the case on the radio or television. He was asked this question by the district attorney:

> Q. Now, it's been alleged that the -- by the Defendant that he can't get a fair trial here in Tate County. Do you have an opinion as to whether or not he can get a fair trial here?
>
> A. I'm sure he could get a fair trial here. The people that I know in Tate County are church- going people and I believe they're honest people who would give him a fair trial.

R. 353.

Davis' trial began in Senatobia on November 4, three and one-half weeks later. Delap was one of the jurors subpoenaed to serve on the special venire. The circuit judge questioned the penal, the district attorney questioned the panel at length, and then defense counsel questioned the panel at length, some several hours. There was nothing about Delap's answers which aroused any question in the mind of the trial judge, the district attorney, or defense counsel as to his qualifications. He was not challenged for cause, and he was not challenged peremptorily.

On the evening after the jury was selected, a member of the family told one of the defense counsel that she had seen Delap sitting with the deceased's family on the day of the motion for a change of venue. Defense counsel checked their notes and

found, or recalled that Delap had testified on the change of venue hearing.[1]/

The following morning defense counsel made a motion for a mistrial, which was overruled, and then following an extended colloquy moved the court to strike Delap as a juror. This also was overruled.

This colloquy developed Delap was (as above noted) a dragnet witness randomly

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[1]/One of the defense counsel related to the court that a member of the family told her Delap was sitting with the family on the day of the venue change hearing. This obviously is without foundation, however, because no claim was ever made this was in fact correct, either during trial or in the hearing on the motion for a new trial. If this had indeed been true, this Court may rest assured that Davis' defense counsel would have ferreted it all out. Davis was represented by one of north Mississippi's best criminal defense attorneys.

subpoenaed from one of the sections of the county to testify, who the prosecution did not interview before he took the stand.

I concede that perhaps it would have been preferable for the circuit judge to have excused Delap and taken an alternate juror. In fairness to the trial judge, however, it should be pointed out this would not have cured his problem. Delap had already spent the night sequestered with the jury panel, and if the judge had excused him, we would still have the argument that he tainted the jury. Regardless of this, however, we must inquire, what is shown in this record to require reversal?

There is absolutely nothing about any of his testimony at the change of venue hearing which remotely disqualified him as a juror. He was asked similar question, but much more exhaustively, on voir dire. The

record reveals 60 pages voir dire questioning of the jury venire by defense counsel.

The majority is reversing on an "appearance of impropriety," when the record unmistakably shows there was no impropriety. Singer v. Singer, 109 So.2d 7 (Fla. 1959); State v. Wisdom, 84 Mo. 177 (1884); State v. Morse, 35 S.D. 18, 150 N.W. 293 (1914); Harden v. State, 49 S.W. 607 (Tex. Crim. App. 1899).

On change of venue hearings, it is customary for the State to call at random citizens from various sections of the county who know nothing about the facts of a case, or the family, and ask them whether an accused can receive a fair trial.

It takes a superior imagination to find from this that such a witness cannot

objectively and impartially hear the case if he should be subsequently called as a juror.

All Delap knew about this homicide was that on April 2, 1985, as he was driving along a road, he was stopped and asked if he knew anything about May's killing, which had happened on that road. He did not know May, none of his family knew May. He did not know anything about who was accused of the killing. He knew nothing about the case. Some member of his family may very well have made a passing mention of the killing in the next several months, but other than this he heard no more about it until he was called as a witness in the change of venue hearing October 9, 1985.

The second reason the majority is reversing this case is that during the penalty phase the circuit court refused to

allow the defense to show that for a previous conviction of deadly assault Davis had been sentenced to twenty years. The jury knew he had been convicted; all they did not know was the sentence.

I will make no further comment on this than to state that in my view it is strange reasoning.

WALKER, C.J., AND GRIFFIN, J., JOIN THIS OPINION.

Testimony of Benjamin Delap at the Change of Venue Hearing in this cause on October 9, 1985. Found at pages 351-357 of the transcript.

DISTRICT ATTORNEY (Mr. Williams): Ben Delap.

BEN DELAP

(A witness introduced for and in behalf on the State of Mississippi, being first sworn to tell the truth, was examined and testified as follows, to-wit:)

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q. Would you state your name, please?

A. Ben Delap.

Q. Mr. Delap, where do you live?

A. Kelly Crossing in Arkabutla, Mississippi.

Q. How long have you lived in Tate County.

A. Twenty years.

Q. Are you employed?

A. Retired.

Q. What was your previous occupation?

A. I was in the automobile business with Chuck Hutton, Horn Chevrolet and Bud Davis.

Q. And, about how long have you been retired?

A. '81.

Q. Did you hear about Mr. Ralph May getting killed in April of this year?

A. When it happened, I did.

Q. Now, since that time have you had occasion to talk with people in Tate County who are either landowners or voters?

A. I have.

Q. How many people would you say that you've talked to since April, roughly?

A. Just talked to about anything?

Q. Anything, yes, sir.

A. Oh, fifteen.

Q. Do you talk to a good number of people on a daily basis?

A. Oh, yeah.

Q. Now, of th people that you've talked to, has anybody pre-judged this case?

A. I never heard anything about the case. There's never been anything brought up about the case with the people I've talked to.

Q. Now, it's been alleged that the -- by the Defendant that he can't get a fair trial here in Tate County. Do you have an opinion as to whether or not he can get a fair trial here?

A. I'm sure he could get a fair trial here. The people that I know in Tate County are church-going people and I believe they're honest people who would give him a fair trial.

DISTRICT ATTORNEY (Mr. Williams): Nothing further.

THE COURT: Cross examine?

CROSS EXAMINATION

BY MR. GILDER:

Q. Mr. Delap -- is it Delap?

A. Yes, sir.

Q. I believe you said the most of your working life, you've been in the automobile business.

A. Right.

Q. And, you mentioned Chuck Hutton and who else?

A. Bud Davis and Horn Chevrolet.

Q. And, all of those dealerships are in Memphis, Tennessee?

A. Right.

Q. So, you've worked in Memphis, then, up until you retired?

A. Right.

Q. And, you've been living in Tate County how many years?

A. Twenty years.

Q. And, how many years have you been retired?

A. Since '81.

Q. So, you've actually been here in this county everyday for about four years or something like that?

A. Everyday.

Q. Did you know Mr. May?

A. I did not.

Q. But you did say that you knew about him being killed.

A. The day that he was killed, I was stopped on the road over there where he was found and asked if I passed there about the time that he was killed.

Q. But, you were aware he was killed?

A. I was aware that he was killed, yes, sir.

Q. Did you ever talk to any of your family or relatives or anybody else and say, "Wasn't that awful about Mr. May getting killed over there."

Q. Well, it was brought up by my family, you know, when something happens like that in a small place like this, it's mentioned but none

of my family knew him. Anytime anybody gets killed, it's an awful thing.

Q. But, people get more upset about it and concerned about it in a small communitty than -- like we're talking about here, than they would, say, in Memphis, where you spent most of your working life.

A. Well, not necessarily. If you knew the man, you'd be upset regardless of whether it was in Memphis or New York City or Arkabutla.

Q. I understand but I'm talking about people in general whether they knew the person or not. There's a killing or two a day in Memphis, isn't it?

A. Probably is.

Q. So, what I'm saying is is this is unusal for Tate County. It doesn't happen often here, does it?

A. Not that I -- there've been three or four people killed in the last three or four years and it upsets the people regardless of whether you knew them or whether you don't know them.

Q. Sure. That's the point I'm making. It does have more impact in a small community that it would in a large place.

A. I haven't heard anything on this cae at all so I don't know how much impact it's had.

Q. Well, did you tell Mr. Williams that you have talked to maybe fifteen people since this happened back in April of this year?

A. I have talked to that many people, but not about the case.

Q. Okay. So, the fifteen people or so that you've talked to have not really discussed Mr. May's death.

A. It never was brought up.

Q. What about when this boy, Danny Davis, was arrested, did any of your family or friends or acquaintances say anything to you about, "Well, they arrested the man that killed Mr. May." Was that ever brought up to you?

A. I never even knew who -- who was accused of killing him until you just told me just now.

Q. You did not know that anybody had been arrested?

A. I knew that someone was arrested, but I didn't know if he was colored or white or nothing. It never was mentioned by the people that I talked to.

Q. Do you take the Commercial Appeal?

A. Every day.

Q. And, you didn't read it in the Commercial Appeal about this Danny Davis, the one who was arrested?

A. I probably read it one time that they had arrested someone but as I say I didn't know if he was white, colored or what.

Q. I understand, but did you read that Danny Davis was the one who was arrested?

A. I probably did read it, but the name didn't register with me.

Q. Do you take the Tate County Democrat?

A. I do not.

Q. Do you listen to the local radio station?

A. I do.

Q. Did you ever hear on the local radio station that Danny Davis had been arrested?

A. I did not.

Q. You never heard that?

A. No, sir.

Q. Do you listen on a daily basis to the radio?

A. Not every day, but I do listen to it once in a while.

Q. Do you watch any of Channel 3, Channel 5 or Channel 13 television stations from Memphis?

A. Occasionally, I do.

Q. So, I guess what you're telling us is that you haven't talked to that many people since Mr. May was killed and you only listen to the news occasionally and that you

remember somebody was arrested for killing Mr. May, but you didn't know who it was. Is that about what you said?

A. That's about it, yes, sir.

COUNSEL FOR DEFENDANT (Mr. Gilder): That's all I have Your Honor.

DISTRICT ATTORNEY (Mr. Williams): Nothing further.

THE COURT: Alright, Mr. Delap, you may step down and be finally excused.

WITNESS EXCUSED

Appendix "C"

Because the jury voir dire takes up well over four hundred (400) pages of the transcript, petitioner has not reproduced the voir dire as an appendix, but instead offers this summary of the voir dire pursuant to Supreme Court Rule 21(1)(h).

The Court conducted the initial voir dire of the prospective jurors. [Transcript pp. 616-744]. The Court's questions focused on those who were eligible for a deferment from service, had special hardships or were in some manner legally impaired from service as jurors. The Court then questioned in the area of exposure to the facts of the case in the media. Juror Delap stated that he had read something about the case in the newspaper [Transcript p. 666]. None of the prospective jurors indicated they had heard anything on the radio. [Transcript p. 668]

Mr. Delap did not indicate he had heard anything on television about the case. [Transcript p. 669] He also did not indicate he had heard "street talk" about the case. [Transcript p. 669]. Mr. Delap did not respond to any of the Court's other questions, indicating no bias or prejudice. Mr. Delap did not respond to any questions by the prosecutor, indicating no bias or prejudice.

Defense counsel posed questions relating to the jurors possible ties with law enforcement officers, the prosecutors office, study of law or psychology or criminology, possible involvement in a Court Martial or criminal case or been a crime victim or had prior jury experience. Further questions related to a acquaintance with witnesses, the victim or his family or law enforcement officers. Mr. Delap

responded that he knew Shelton Ingra, Sheriff of Tate County, Mississippi. [Transcript p. 875]. In response to a question of whether there was a gun in the home, Mr. Delap responded that he had a shotgun and a rifle. [Transcript p. 914]. Further questions involved whether jurors had visited a jail or prison and church affiliation. Mr. Delap indicated he was a member of the Church of Christ. [Transcript p. 944] Further, questions related to whether any juror would have problems sitting in judgment of another person, college attendance and whether they would automatically vote for the death penalty.

Mr. Delap was not involved in the individualized Witherspoon/Witt voir dire of six members of the venire. [Transcript p. 976]

Mr. Delap did respond to specific questioning when such pertained to him, and it must be assured that he would have responded if any of the questions relating to impartiality had applied to him. By his silence he indicated he was not biased or prejudiced in any fashion.

[Trial Transcript pp. 1088-1127]

WEDNESDAY, NOVEMBER 6, 1985

IN CHAMBERS

(The following proceedings take place in Chambers, outside of the presence of the Jury. The Defendant is present.)

THE COURT: We are getting ready to begin the actual trial of the case. I understand from Mr. Gilder there is a matter to take up preliminarily before we start in open court. Alright, Mr. Gilder.

COUNSEL FOR DEFENDANT (Mr. Gilder): Yes, sir, Your Honor, the matter we wanted to take up with the Court this morning concerns the man who was originally listed as Juror Number 59 on the Jury List, Mr. Benjamin Delap, on the list, as the Jurors are seated as Jurors for the trial. Your Honor, whether we do it by stipulation or

through the Clerk, we want that list to be made a part of the record in this case, or a copy of it to be. Yesterday afternoon Ms. Rutherford asked me if Mr. Benjamin Delap had not been present with the family of the deceased on a date we were here for a Motion For Change Of Venue. I told her at that time, I didn't recall seeing him -- having seen him. When we went downstairs, the wife of the Defendant asked us if the man with the little short hair -- greyhaired man with the little short hair hadn't been down here on the date we were here for a change -- Motion For Change Of Venue. Ms. Rutherford, then, went through her notes on the hearing for the Motion For Change Of Venue and discovered that Mr. Ben Delap had, in fact, testified

as a State's witness for the -- in opposition to our Motion For Change of Venue, and having already appeared as a State's witness in opposition to the Motion For Change Of Venue, and having already appeared as a State's witness in opposition to the Motion For Change Of Venue, that he's now seated and has spent the night with the Jury panel that's selected to try this case, and, of course, we want to be certain to try this case, and, of course, we want to be certain that we're correct on this, but we'd like to ask Mr. Delap if this is, in fact, the case, and if he was a witness in the case. I honestly don't recall whether he was or not, but Ms. Rutherford's notes do show that a Ben Delap did testify at the hearing on the Motion For Change Of Venue.

THE COURT: Any response?

ASSISTANT DISTRICT ATTORNEY (Mr. Kelly): Yes, Your Honor. I have some preliminary remarks to make. When this Jury was challenged for cause and peremptory, the Defendant had the ability to have the same knowledge as the State as to the persons who testified either in behalf of the Defendant or in behalf of the State at the Change Of Venue hearing. The State exercised its challenges for cause and preemptorily based on the Jury List behind it -- before it at that time. The State is -- the State will inform the Court that Ben Delap did testify in the Change of Venue motion hearing as a witness for the State of Mississippi.

COUNSEL FOR DEFENDANT (Mr. Gilder): Your Honor, with that acknowledgment by the State, then, at this time, the Defendant moves that the entire panel be stricken and that a mistrial be declared since this knowledge was apparently within -- or since the State was aware of this at the time the Jury was selected, and we fell like that whether we were aware or knew it. We didn't -- and I can tell the Court that we didn't, and I'm prepared to testify under oath, so is Ms. Rutherford, but certainly he would have been challenged for cause and we say that in an effort to obtain a fair and impartial trial, it was a duty on the State to disclose that there was still a member ~~on~~ the panel who had been a State's witness in prior proceedings in this case and

since this wasn't disclosed that the entire panel has now been contaminated by the selection of a State's witness to sit as a Juror in this case, and we respectfully move for a mistrial.

DISTRICT ATTORNEY (Mr. Williams): I'd like to respond, too.

ASSISTANT DISTRICT ATTORNEY (Mr. Kelly): And, I also, when Mr. Williams has finished.

DISTRICT ATTORNEY (Mr. Williams): Judge ...

THE COURT: Wait just a minute and let me see if Mr. Gilder was through.

COUNSEL FOR DEFENDANT (Mr. Gilder): Your Honor, the only thing I might want to add at this time is that even though I didn't ask the question of the panel, have you ever been a witness in this case in any prior proceedings, I did ask the general question, do any of you know any reason that you might -- or couldn't be a fair and impartial Juror in this case, either knowledge that you have on the lack of any questions that I've asked or the lack of any questions that I've asked or the lack of any questions Mr. Williams has asked or the lack of questions that the Court has asked, and we sincerely represent to the Court that a man who's been a witness in the case already should have made known at that time that he had been a witness. This -- and, I've

practiced law for twenty-four years and I've never see a State witness be one of the Jurors in the trial and the case go to trial and this being a capital case. I think it would be one of the most reprehensible that could occur now in American Jurisprudence for such a situation to occur.

ASSISTANT DISTRICT ATTORNEY (Mr. Kelly): Your Honor, would you excuse me to get my notes from that motion hearing?

THE COURT: Yes, sir.

ASSISTANT DISTRICT ATTORNEY (Mr. Kelly): Because I feel that what this witness testified to in the motion hearing is being misrepresented.

THE COURT: To go get your notes?

ASSISTANT DISTRICT ATTORNEY (Mr. Kelly): Yes, sir. I'll wait. I want to hear what Mr. Williams says.

DISTRICT ATTORNEY (Mr. Williams): Judge, as I recall, and I don't have the exact date, but I believe that those motion hearings were probably two, two and a half or three weeks ago, in that neighborhood. We'll supplement the record by showing the exact date. Now, the hearing that this witness testified in was, as Mr. Gilder said, Defendant's Motion For Change Of Venue. It was alleged that ill-will in the community existed against the Defendant to such an extent that he couldn't get a fair trial in this

county, and other witnesses from various parts of the county testified at that same time, and as I recall the testimony of Mr. Delap, he indicated that in his opinion, from what he heard, that this man could get a fair trial in Tate County. Now, Mr. Delap was subjected to cross examination, he was confronted Mr. Gilder himself. The position from which Mr. Gilder cross examined this witness at the change of Venue hearing, was probably in the neighborhood of eight to ten feet and I'm satisfied that Mr. Gilder is not blind. I'm satisfied that I've never even see him wear glasses. Now, while it's true that this witness was called by the State, to my way of thinking a witness -- any witness on a Change of Venue hearing, is really the Court's

witness, because it is an issue ultimately that the Court has to decide, based on the Leon Johnson and Fisher case, from witnesses. Now, this witness testified that the Defendant could receive a fair trial. He sat in the panel, he was interrogated as thoroughly as any Juror or any Jury panel I've seen voir dired in any capital murder case. He indicated, as I recall, that he had heard about the case, he said he could try the case from facts and evidence. There was absolutely nothing in his responses that would indicate any bias or any prejudice. Now, with all due respect to Mr. Gilder and Ms. Rutherford, this quite frankly reeks of an out-and-out sandbag, and to me, I can't see how, when counsel cross examined the

witness, eight to ten feet from him, two and a half to three weeks ago, he can sit by silent and not challenge this witness for cause, not challenge him preemptorily, and come in and say, "Oh, after we accepted him, we now look at our notes, and find out that this may be the same man." It reeks, to me, or just an out-and-out sandbag, and, again, I say that with all due respect to Mr. Gilder and Ms. Rutherford, but I think they are -- the law charges any lawyer with knowledge of any existing facts to, you know -- I just can't see how he can come in at this -- at this time and say, "We now find out, for the first time, that this may be the man that testified that this Defendant could get a fair trial." In any event, there is absolutely nothing from the

remarks of Juror Delap to indicate any prejudice or bias. I think his answers to the voir dire are totally consistent with what he said before this Court at the Change Of Venue hearing.

ASSISTANT DISTRICT ATTORNEY (Mr. Kelly): Your Honor, not only that, but it is apparent from the diligence with which the Defendant's attorneys voir dired the panel yesterday; with the diligence that the Court and Mr. Williams voir dired the panel; the thoroughness with which the Defendant's attorneys challenged Jurors for cause in Chambers and the time that was taken in exercising peremptory challenges and the fact that the Defendant did have a peremptory challenge available to him when Juror Delap was tendered to them,

and they failed to exercise it. Logic dictates that there was no reason brought forward either by the Court, by the State or by the Defendant why Delap should be disqualified other than the fact that the Defendant's attorneys were satisfied with him, based upon his responses under oath as a Juror. At this point, I'd like permission to leave and get my pretrial motion notes.

THE COURT: Alright, sir.

(At this point in the proceedings, the Assistant District Attorney leaves Chambers to get his notes. Presently, the following proceedings take place.)

ASSISTANT DISTRICT ATTORNEY (Mr. Kelly): For the record, my notes reflect that the Court conducted a

hearing on a Motion For Change Of Venue filed in behalf of the Defendant on October 9, 1985 in the Tate County Courthouse in Senatobia. Mr. Gilder was present; Ms. Rutherford was present; the Defendant, Davis, was present. The State produced the following witnesses against the Motion For Change Of Venue; Emmett Hale, James Sowell, Ralph Dandridge, Boyce Brewer, John R. Price, Jr., Jack Houston, Ben Delap, Thomas I Gordon, Wilfred Wacker -- I'm sorry, Walker, Sarah Bondurant, Glen Gann. Testifying in behalf of the Defendant was Rosetta Fier, the mother of the Defendant; Earl Kopf, Justice Court Judge; Shelton Ingram, the Sheriff of Tate County; and Martha Taylor. My notes indicate that witness, Delap, now a Juror, was taken

on direct examination by Mr. Williams, after having been sworn by Steve Lentz, the Clerk. He retired by the automobile business. Delap lives in Arkabutla, for approximately twenty years. He's retired from the automobile business. He heard about a killing in the month of April. He has not heard much about this case, if anything. The Defendant could get a fair trial. The folks in Tate County were honest and church-going. On cross examination through Mr. Gilder, Delap indicated he worked in Memphis in the past. He retired in 1981. He did not know the name of the victim. He did not know the person who had been killed. He had lived in Tate County for twenty years. He had not heard about this case. he had talked with

approximately fifteen people since April on different occasions; that he did not know who was accused of the murder; that he does read the Commercial Appeal. He does not read the Tate County Democrat. He does listen to the local radio station and he occasionally watches T.V. from Memphis. I submit to the Court there is nothing inconsistent with what he testified to both on direct examination and cross examination with what he told this Court, the State's attorneys and the defense attorneys as a potential Juror in the venire sitting in open courtroom. There is no evidence or reason to indicate that he would be an unfair or improper Juror. The Defendant, his mother, his attorney were present on October 9th when Delap

testified. They were present yesterday and Monday when the jury panel was seated in the Courtroom. There is nothing inconsistent in Delap's testimony on the Motion hearing and his responses to voir dire examination.

COUNSEL FOR DEFENDANT (Mr. Gilder): Your Honor, there is one correction I'd like to make for the record, if Mr. Kelly's through. The motion and wife were not present during voir dire of the Jury because I had invoked the Rule, so of course, Ms. Rutherford, the Defendant and I were present, but in support of the motion I'm making, and I want to testify to clear up any question about whether we knew man had been a prior witness, I would ask permission for the Court to swear me

and allow me to testify as to whether -- to when we learned that this man had been a prior witness, and, also, Ms. Rutherford.

THE COURT: If you wish your statement to be by way of sworn testimony, Mr. Gilder, I'll permit it -- I'll accept it as an officer of the Court, but if you prefer that it be sworn testimony, I'll permit it.

COUNSEL FOR DEFENDANT (Mr. Gilder): I'd like for the record to reflect that it's sworn.

THE COURT: Alright, sir.

(At this point in the proceedings, Defense Attorney, Robert Gilder, is sworn in by the

Court. Presently, the following proceedings take place.)

COUNSEL FOR DEFENDANT (Mr. Gilder): The statement that I had made previously when we came into Chambers was that yesterday afternoon, after the Jury had been selected, there was discussion between Ms. Rutherford and me about Mr. Delap as to whether he had been here at any prior proceeding. Ms. Rutherford, said that to her he looked familiar. When we got downstairs, the wife of the Defendant asked us the question of whether or not the man with the short hair -- well, really, it was the family, and the mother was present, too -- had not been here with the family of the decedent

when we were in Court on another occasion.

THE COURT: Let me make sure, Mr. Gilder, what time yesterday?

COUNSEL FOR DEFENDANT (Mr. Gilder): This was after the Jury had been selected. It was like after 6:30 yesterday afternoon or 7:00 o'clock, whenever it was that the Court dismissed the Jury to allow them to go for the day. We were looking back over the Jurors as they were leaving the Courtroom and Leigh Ann asked me at that time if Mr. Delap had been down here that day or did he look familiar, and to me he didn't. I didn't recall ever having seen him. When we got downstairs and the family expressed

concern about it, then I wondered -- maybe he had been with the family, and that concerned me because we didn't show that he knew the family at all as far as our notes were concerned. The -- at that point Ms. Rutherford went back and started going through records of the hearing to see whose names were listed and she found Ben Delap, one of the witnesses for the State at the Motion For Change Of Venue and this was after the Jury -- I don't know if they had left for the motel, but they had already left to make their calls under the instructions of the Court to allow the Bailiffs or to have the Bailiffs allow them to make calls. So, this was when she found her notes; after the proceedings were over and we had adjourned until this morning, and that

was the first knowledge that I had that this man had been a State witness in this case. Now, whether that was due to stupidity on my part or whatever, it is the truth. I would never have allowed him to sit as Juror, knowing that I had cross examination him when I was trying to move the case out of Tate County, saying -- taking the position that he couldn't get a fair trial, I certainly wouldn't allow a witness who had appeared in opposition to that to sit as a Juror, knowing I'd taken the position already that the man couldn't get a fair trial in the County, and now he's a member of the panel. So, that's exactly when I learned about it.

THE COURT: Okay. Cross examination, Mr. Williams?

CROSS EXAMINATION

BY MR. WILLIAMS:

Q. Mr. Gilder, you did cross examine this man, didn't you?

A. From Mr. Kelly's notes and Ms. Rutherford's notes, there's no doubt I did cross examine him.

Q. On October the 9th?

A. Definitely. I think the record shows that.

Q. And, this man was in your presence at a distance of eight to ten feet for what, twenty minutes or so?

A. I doubt that twenty minutes or so, but certainly he -- I was standing up questioning him and he was probably ten feet from me; that's true.

Q. Fifteen minutes? And, you don't have any problem with your eyesight, do you?

A. No, sir. My eyesight's fine, but what I told you is true.

Q. You don't have any problem with your memory, do you?

A. None.

Q. And, the Defendant was present?

A. The Defendant was present at the Motion For Change Of Venue and during Jury Selection.

Q. There's nothing wrong with his eyesight, is it?

A. Well, I really couldn't answer that question.

Q. I've never seen him wear glasses. Have you ever seen him wear glasses?

A. I never have.

Q. What about Ms. Rutherford, does she wear glasses?

A. Well, she wears contacts right now, but in the past she wore glasses.

Q. She's not blind, is she?

A. No, sir, I wouldn't say that.

Q. There's nothing wrong with her memory, is it?

A. I think she has a good memory.

Q. And, as I recall yesterday y'all took about forty-five minutes or an hour to go over your challenges for cause before you actually came in and challenged for cause, didn't you?

A. We did.

Q. And, the Defendant was present?

A. While we were going over our yes. challenges.

Q. And, you consulted with him?

A. Yes.

Q. And, there was nothing in the responses of this Juror to indicate that he could be nothing less than a fair and impartial Juror, was it?

A. No reason other than I believe that he attempted to get on the Jury because he knew he had been a witness in this case and it should have been disclosed.

Q. You're not telling this Court that you're a mind reader, are you, Mr. Gilder?

A. No, sir. But, I have to be a pretty good guesser, just like you do, to try lawsuits.

Q. And, you say that's your opinion.

A. It definitely is.

Q. And you saying that the Juror lied when he said he couldn't be fair?

A. I'm saying that the Juror failed to disclose information to this Court that he should have disclosed. When he was asked a general question, just like all the panel was, if there's no question that's been asked that applies to you, if you know of any reason; that if the Court didn't ask the

question, Mr. Williams didn't ask the quest and I didn't ask the question, tell us now. This is the only time for us to know, and the man could have said, "I was already a witness in the case."

Q. Mr. Gilder, there's not one single solitary thing inconsistent with what that man said about this Defendant's ability to get a fair trial on December 9 and the responses that he gave to you, to me and to the Court in the last two days, is it?

A. Not only the responses, Mr. Williams, the lack of responses. He should have responded and made the information available, and he didn't.

Q. Well, by the same token, would you not agree, Mr. Gilder, that to some extent you ought to be presumed to know who testifies in a case, as you say, of this magnitude?

A. Well, if you're asking me should I have remembered him, I certainly think I should have, but I didn't, and that's a fact.

Q. Would you agree that there is a possibility that in a situation such as this, a lawyer could lay back and trick-bag the Court; do you agree with that?

A. Oh, very definitely, Mr. Williams, and in fact, if that was what I was trying to do, I would have waited until this case was over and made a motion for a mistrial. I disclosed it this morning because I only knew about it last night after we adjourned. If I have been trying to sandbag the Court or trick the Court, I would have sat here. I have that much intelligence, if I wanted to be that devious, that I could wait until the trial is over and then made a motion for mistrial on the same basis, but I

disclosed it at the earliest possible time and that was this morning.

Q. Did you take notes during the October 9 hearing, Mr. Gilder?

A. Ms. Rutherford did. I did not.

Q. And, I'm assuming, you correct me if I'm wrong, those notes were in your file yesterday?

A. Her notes were in our file yesterday.

Q. And, those notes, I assume, are still in your file?

A. They're still in her file.

(At this point in the proceedings, the District Attorney and Assistant District Attorney have a brief conference. Presently the following proceedings take place.)

DISTRICT ATTORNEY (Mr. Williams): I don't have any more questions.

THE COURT: Anything further, Mr. Gilder, by way of your testimony.

COUNSEL FOR DEFENDANT (Mr. Gilder): Not by way of my testimony, Your Honor.

THE COURT: Alright. Do you wish Ms. Rutherford to give sworn testimony?

COUNSEL FOR DEFENDANT (Mr. Gilder): Yes, I do, Your Honor.

(At this point in the proceedings, Defense Attorney, Ms. Leigh Ann Rutherford, was sworn in by the Court. Presently, the following proceedings take place.)

COUNSEL FOR DEFENDANT (Ms. Rutherford): Yesterday afternoon, after we were going over the Jurors for cause, Delap

unsettled me. I don't know why he unsettled me. I know now why he unsettled me, I did not then, but I wasn't comfortable with him, but there were a lot of Jurors out there that I was uncomfortable with. We went through out list to try to determine who to go through for cause and one thing we were very concerned about was people who had known the victim or the victim's family. We went through our notes scrupulously to check a lot of those matters. So, we went through the Jury process and we closed for the day, and we went down the stairs to go out to the car, and the Defendant's wife was there and she was extremely upset. She was in tears. She was almost incoherent. She was in tears. She was almost incoherent. She was crying

hard, and I didn't understand what the problem was then. When I finally got her calmed down, she was very concerned about some of the people on the Jury, at least one of them, and she told me that she was positive that he had been with the family during that day of the motion hearing in October. And, I asked her if she was absolutely positive, and she said she was positive. So, I sat down and went through our notes to see if I had the notes from the hearing in the file and I did. So, I looked through them and there was a man named Ben Delap. The Juror's name on the sheet had been Benjamin, and then I knew we might have a problem so I took all the stuff I had home and I went through everything I had, and it seemed to me that it

couldn't be anybody but the same person. I really didn't think it was the same person at first because I really felt sure that if there was a problem like that on the Jury that the State would have disclosed it and I wouldn't think they would every allow anything like that to go forward, knowing that. I haven't been doing this very long, and you know, I'm not real, super comfortable with the system just yet, so I check through my notes to make sure that that was the guy. And, Your Honor, we're pretty sure, after the State saying that he's the same one, that he is the same one. One other matter. On the day of October 9th, when the State presented, I counted at least eleven witnesses that day and we had no list of the witnesses

that were to be called. As they took the Witness Stand, their names were called, and as Mr. Kelly was reading the names back to the Court, I looked through my notes and I had a lot of names wrong and it was hard to hear. There was no way to determine -- the people said their names quickly and unless you just happened to know the people, it was hard to catch some of the names. Also, that day, there was twenty-eight motions that we went through and heard. It was an extremely, extremely busy day and we should have remembered that man, but we didn't. I really did not.

THE COURT: Cross examine?

DISTRICT ATTORNEY (Mr. Williams): Yes sir.

CROSS EXAMINATION

BY MR. WILLIAMS:

Q. And, so, Ms. Rutherford, you are saying that we did something improper, is that what you're implying?

A. No, sir, I'm not implying you did something improper, but I really thought that if ya'll had known that you had a witness on the Jury panel, you would have disclosed it. I really thought you would have. That's why I checked my notes so carefully -- I didn't think...

Q. There's nothing wrong with your memory, is it?

A. Not to my knowledge.

Q. Nothing wrong with your eyesight, is it?

A. There's not a big problem with my eyesight. I don't have on my contacts today and I did not yesterday and I did not Monday, and I don't recall if I had time on during that hearing or not.

Q. And, Mr. Gilder questioned that panel for three or four hours, didn't he?

A. He did.

Q. And, asked them every conceivable question, or tried to, about bumper stickers and church affiliation and color of socks they wore and God knows what else, didn't he?

A. Mr. Gilder asked the Jury a lot of questions.

Q. And, lo and behold, out of the heavens a revelation comes that this man is a witness for the State, just bam it just all hit you like a trian, is that what you're telling the Court?

A. I'm telling the Court that I was not aware he was a witness for the State. He unsettled me at the time through the process yesterday. When our client's wife was so upset with this particular man and she said that he had been with the family and my notes did not reflect anywhere that he had ever to the Court or to you or Mr. Gilder, indicated that he even knew the family, then I thought I'd better check my notes.

Q. Ms. Rutherford, you said, and you correct me if I'm wrong, or Mr. Gilder did, that the boy's wife and mama and family weren't in the Courtroom when the witness testified, didn't Mr. Gilder say that?

A. During voir dire?

Q. No, during the Change of Venue hearing?

A. I thought Mr. Gilder said that the wife and mother weren't in the Courtroom during voir dire to help us in selecting the Jury

because the Rule was invoked. That's what I understood Mr. Gilder to say.

Q. And, you're saying that that man sat with the family?

A. I'm saying my client's wife told me that. She was in tears, she was upset, and she was really upset about this particular person. Now, they were in the Courtroom during some of the motion hearing in October. Whether they were there the whole time, I don't know, because I don't -- his mother testified and I'm not sure whether his wife did or not, but I know they were in Court that day and they have been in Court this week and they have been watching the coming and going of people in the hall since they couldn't be upstairs and help with voir dire because we invoked the Rule.

Q. Ms. Rutherford, don't you remember that on October 9 that man came up the stairs,

got on the Witness Chair and submitted himself to direct and cross examination and got off that Witness Chair and went down those steps and went about his way?

A. Mr. Williams, I know he came out this door. I know he came back, but I don't know what in the world happened -- what was happening behind me and really I was not that much aware of what was going on: it was what was in front of me that I was trying to keep track of.

Q. Well, you know it's virtually -- well, it is impossible for Mr. Delap to be in two places at one time, don't you, Ms. Rutherford.

A. Mr. Williams, it is not impossible after he testified to leave the Courtroom and come back, people do it all the time, particularly since there are two entrances here because anyone can come back, you

know. I don't know if he was with the family before, but he certainly could have been with the family afterwards.

Q. Well, I could fly a jet airplane, too, Ms. Rutherford, but I can't. Anything's possible. Are you telling this Court that that man sat with that family?

A. I'm telling the Court that my client's wife told me that he was sitting with the family during the motion hearing at some point in October; that's exactly what I'm telling the Court.

Q. Yet, you saw him come up these stairs and take that Witness Chair and when he got through, he would go right back down stairs, didn't you? You saw that with you own eyes?

A. I saw him come in the door and go out that door, but we were in here a long time that day. That was the first motion, I understand, that was heard.

Q. And, that's the same man that you saw come in that door, testify and leave, that you wouldn't remember testifying on October 9. That's the same man you remember testifying on October 9. That's the same man you remember so vividly coming up the stairs an testifying, going back down stairs; that y'all completely, mistakenly, overlooked as a witness in the Motion for Change of Venue hearing, is that what you're telling this Court?

A. I'm afraid he is the same man.

Q. Well, you said you recognized him coming up them stairs and leaving down the stairs, didn't you?

A. What I testified to is that to my knowledge that he came in this side door, just like every other witness that y'all called that day. I bet you called eleven that day; you called a bunch that day.

Q. And, so, now, we have tricked you, is that what you're saying; we've done something improper and illegal?

A. I'm not saying that you've done anything improper or illegal, I'm just saying there is a Juror on -- in the Jury Box, Number 11, who has been one of your witnesses and I don't think he should be there.

Q. Alright, now, you will admit, Ms. Rutherford, that there exists a possibility that any shrewd professional criminal defense lawyer could lay-back and trick-bag the Court; you will admit that possibility, won't you?

A. I will admit that possibility, yes.

Q. And, by the same token, you've been present when this Court had to in affect, mis-try a case because the lawyer thought the Court recommended fifteen years --

fifteen months with ten months suspended and that that was all a big misunderstanding, wasn't it, Ms. Rutherford?

A. I was employed in that case where there was a very big misunderstanding regarding a plea bargain.

Q. And, you know from that -- from that case, that because Mr. Gilder, who has been practicing criminal law for twenty-four years, thought that the State was going to recommend fifteen months with ten months of the sentence suspended, that case had to be, in affect, mistried and continued until the next term of Court, don't you, Ms. Rutherford? You know that happened, don't you, the Patsy Sue Haven case?

A. Well, that's what you may think, but that ain't what I think.

Q. That's what I think now. That's not what I thought at the time. I choose to

think that nothing was represented -- was deliberately misrepresented by either side in that case. I think it was a mutual misunderstanding. It was unfortunate. It was difficult for us to deal with our client afterwards because of what happened, but it happened, and I think it was a mutual misunderstanding on both sides. I don't think either side -- I hope neither side would ever deliberately engage in such tactics as that.

Q. You agree, don't you, Ms. Rutherford, that that happened?

A. I agree it was a misunderstanding.

Q. A "misunderstanding" that the State was going to recommend on a murder charge an agreed motion to reduce to manslaughter, that the Defendant be sentenced to fifteen months, with ten months suspended, and because of this "misunderstanding," the case

was mistried and had to be continued and reset at the next term of Court, you agree with that, don't you?

A. I don't agree with quote, misquote, misunderstanding. I think that it was a fact misunderstanding.

Q. And, are you saying, as you imply in this case, that we deliberately misled Mr. Gilder in that case?

A. In that case. I would choose to believe that you did not, but I would choose to believe that you would have disclosed, if you had known it in this case. I'm really frankly surprised that you didn't in this case. I really am.

Q. Well, you want to talk about frankness, I'll... just a few more. Ms. Rutherford, your client's wife and mother have been here at the Courthouse Monday and Tuesday, have they not?

A. Yes, sir.

Q. And, as a matter of fact, one or both were in the Courtroom on Monday when the Jury panel was given the first oath it took and when that was accomplished, Mr. Gilder asked that the Rule be invoked and that's whenthey had to leave the Courtroom, isn't it?

A. Mr. Williams, the only person I remember in the Courtroom, and I could be wrong, I remember Dede being in the Courtroom at the very, very back. I don't know -- I don't know if that was Monday or Tuesday, but I remember telling her she was going to have to leave when the Rule was invoked.

Q. And, Mr. Delap was in the same room with her at that time, wasn't he, Ms. Rutherford?

A. Yes, sir, along with a whole lot of other people, at least ninety other people.

Q. And, you're not telling the COurt that you have not counselled and conferred with the Defendant's family since this trial begin on Monday until last night at 7:00 o'clock, are you?

A. What I'm telling the Court is the information that the family related to me regarding Delap was not related to me until after Court adjourned.

Q. I understand all of that, Ms. Rutherford. Are my questions confusing you?

COUNSEL FOR DEFENDANT (Mr. Gilder): Your Honor, we object. There's no Jury present; there's no sarcasm.

DISTRICT ATTORNEY (Mr. Williams): All I would like...

THE COURT: Let's move on, Mr. Williams.

DISTRICT ATTORNEY (Mr. Williams): All I would like is an answer to the question, Judge, they can make any self-serving statements they want to.

THE COURT: Alright. Ask the question again.

Q. Now, Ms. Rutherford, are you telling this Court that you have not conferred with the Defendant's family from 9:00 o'clock Monday until 7:00 o'clock Tuesday night, yes or no, and you may explain your answer to your heart's content, if it takes forty-five days. You can offer any self-serving explanation you want to. Answer it yes or

no, please, ma'am. Do you understand the question?

A. Yes, sir, I understand your question.

Q. Will you, please, answer it yes or no, and then you may explain.

A. I understand. I am not telling the Court we have not conferred with our client's family from 8:00 o'clock or whatever time early Monday morning until 7:00 o'clock last night, but I am telling the Court I don't believe that information was related to us until last night.

Q. So, then, we can assume, I suppose, that you have conferred with the Defendant's family at sometime or times between 9:00 o'clock Monday and 7:00 o'clock Tuesday night.

A. We have conferred with the family from 9:00 o'clock Monday until 7:00 last night and there were other people they were

concerned about and they may have been concerned about him at that point, but what I'm saying is, last night it wasn't just a light concern about him, it was a major concern. The wife was crying, she was extremely upset, upset to the point that I really felt we needed to start looking very, very closely to see if what she said was true because she was so extremely upset. They had not been in the Courtroom. They had not had an opportunity to listen to the answers to the questions, and I honestly thought that if he had been in the Courtroom on October 9th, and if he had sat with the family, he certainly would have answered to the Court and to you and to Mr. Gilder, "Yes, he knew the family." There was no response in our notes that he knew the family. Nowhere that I could find -- the only place that I find any response from him

in my notes was that in the question about owning a gun, he owned a shotgun and a rifle. I think, and he answered the question about knowing Sheriff Ingram, and those are the only questions that he made any response to. He made no response to the questions asked by the court, by you or by Mr. Gilder regarding any reasons why he could not be a fair and impartial Juror, when all the time he knew he had been on that Stand as a witness for the State testifying that he could give this man a fair trial.

Q. Ms. Rutherford, would you agree that the Court would be in a position to see the audience at the October 9 hearing and to know for a fact, rather than out-and-out conjection and speculation whether or not this man sat with the family, would you agree with that?

A. The Court certainly should know...

Q. I realize that...

A. ...but, Mr. Williams, there were a lot of people there that day and there have been a lot of people through this Courtroom and this Court has seen a lot of people. If he remembers, I certainly would take his word for it.

Q. Obviously, Ms. Rutherford, you don't have eyes in the back of your head, but you'll agree that the Court faces the audience and did fact the audience on October 9. Would you not agree with that?

A. Goodness, yes.

Q. And, as far as personally knowing that Mr. Delap sat with the family, that is on your part out-and-out speculation.

A. All I'm relating to you is what my client's wife told me.

Q. Do you have any personal knowledge? Did you see him with your own eyes?

A. Mr. Williams, I did not see him with my own eyes, but the point of bringing in the Defendant's wife is the reason we starting checking things so closely and the reason that we even discovered that this guy had been a witness.

Q. So, the answer, I assume, to the question is, you have no personal knowledge of that allegation that this man sat with the family?

A. That's true. That's true.

Q. And, you have no personal knowledge that this man either knows or does not know the victim and his family, do you?

A. I have no personal knowledge of that.

Q. And, would you agree that -- strike that. I don't have anymore questions.

THE COURT: Anything further, Ms. Rutherford, concerning your testimony?

COUNSEL FOR DEFENDANT (Ms. Rutherford): Your Honor, one thing. Should this go up on the record at this point, the sentence that was given Haven was not that much different to what was misrepresented. But, that's the only thing.

THE COURT: I'll state for the record that I can recall sentencing Haven; I believe it was ten years with nine years suspended.

COUNSEL FOR DEFENDANT (Ms. Rutherford): The actual time served, Your Honor, was not that much difference.

THE COURT: Anything further, Mr. Gilder:

COUNSEL FOR DEFENDANT (Mr. Gilder): Yes, sir, for the record, Your Honor, I want to ask Mr. Williams if before this Jury was seated if he knew that Mr. Ben Delap was in fact or had been a State Witness at the Change Of Venue hearing on October 9th.

DISTRICT ATTORNEY (Mr. Williams): Yes, sir. There's nothing wrong with my eyesight or my memory either.

COUNSEL FOR DEFENDANT (Mr. Gilder): Okay, I want to ask Mr. Kelly if he knew before this Jury was impanelled that Mr. Benjamin Delap had in fact

been a State's witness at the Motion For Change of Venue on October 9th.

ASSISTANT DISTRICT ATTORNEY (Mr. Kelly): Yes, sir.

COUNSEL FOR DEFENDANT (Mr. Gilder): As far as proof, then, Your Honor, I don't care about calling Mr. Delap. The basis for my motion is not whether he does or does not know the family. The basis for my motion is that a State's witness in prior proceedings, is an improper Juror and should have never been seated, and if there's any sandbagging, Your Honor, in this case, that's gone on in this case, it's been done by the State because this is a matter that I'll go on the record any place for that if we're impanelling a

Jury, whether it's a capital case or not, and the State has knowledge that one of the Jurors that's about to be seated has been a witness, I think that there's a duty on the State. I think the duty extends under the concerpt of fair and impartial trials, that if the witness had failed to disclose that, that the State can't sit back and say, "well, we assumed that the defense had as good a memory as we had." This is too an important a thing. This is crucial. It goes back to the heart of the whole system and we respectfully submit that the basis for the motion is not whether the information is accurate, that the man knows the family. He's sitting as a Juror on this case now and we think that the harm has been done. And, we think that

this, Your Honor, demonstrates the concern we had when we filed the Motion For Change Of Venue; the reason being that there were so many that knew the family and, as the Court pointed out, this case was less publicized than a lot of other cases, and this is the reason a Change Of Venue could have done more good. There are cases like Lee Harvey Oswald, couldn't have got a trial without people having knowledge anywhere in the world, when President Kennedy was assassinated. There are cases in Your Honor's District that are highly publicized that whatever county the Court moves them to, the people are going to be aware of the case. In this particular case, nobody outside of Tunica County -- I'm sorry, Tate County, the odds are probably a hundred

to one that nobody would have even known about the case in any other country. But, e think that this emphasizes the problem. We're trying the case in a small community where the people know each other. We think that the fact that this man seated himself on this Jury and because a Juror shows the potential for harm that can come in a small community when a tragic thing like a murder occurs, and we mention that simply because we were so strong in urging the Motion For Change Of Venue and we fell like that now this panel is tainted, where a man has served as a State witness in the case, and I don't know how you undo that harm other than moving for a Motion For Mistrial. I realize we've been through two exhaustive days of Jury selection

and certainly I don't relish the idea of having to go through it again. I will say for the record that me fee won't be anymore. I don't get paid anymore if we try this case one time or ten times. So, I have nothing personal to gain by moving for a mistrial, and I know it's costly to the county, but we're dealing with a capital murder trial, and we have a man seated with this Jury who was a State witness and not only that that was known by the State's attorneys to have been a State witness prior to the Jury being finally seated, and we respectfully submit that this is a proper case, in fact justice cries out, for a mistrial to be declared in this case for this reason.

THE COURT: Any response?

DISTRICT ATTORNEY (Mr. Williams): Judge, I just want to make a few observations, and I think the old adage that the bit dog barks the loudest is certainly appropriate, at least in my humble judgment, in this case. Now, I never cease to be amazed at how defense attorneys attempt to infer and insinuate that it's always the D.A.'s Office that wears the black hat and is under-handed, and does all these improper and illegal things. I -- I can say, from my experience as a Prosecutor, that as the days go by it gets more and more fashionable. In any event, this Court is going to have to make this decision, but I do say that I believe this Defendant and his counsel should be charged with the obvious and I think that, quite frankly, and if it

hurts anybody's feelings, I really could care less, but, as I said, it just absolutely reeks of sandbagging and that's not the first time it's happened in this Court exists, and that's my personal feelings, that's my personal observations and, again, if it offends anybody, I quite frankly don't care, but my conscience is clear, Mr. Kelly's conscience is clear. We have done absolutely nothing improper and at the very least, this man, who sits on this Jury has not said anything inconsistent with what he said on October 9, and that is, that the man could get a fair trial here in this county and that this man can be fair and impartial. Now, if there was anything to the contrary, by this man's responses; if I had any reason to

believe anything to the contrary, I'd join in the motion.

ASSISTANT DISTRICT ATTORNEY (Mr. Kelly): Your Honor, for the record, I would like to put some background factual information for the benefit of the Appellant Court. When the Defendant filed the Change of Venue motion, Mr. Williams, asked me to be sure that we had witnesses available to oppose it. The way I did that was to contact members of the Board of Supervisors and Mr. Price, the Chancery Clerk, and I learned that they, in fact, would be available to testify. I then asked Sheriff Ingram to find five or six or more persons from the diverse corners of Tate County to come in and testify as to what they knew or did not

know about the case of the State of Mississippi v. Danny Ray Davis. Neither Mr. Williams nor I knew who those five or six or eight people would be prior to appearing in Court on October 9t. We had never met them before. In fact, we had never interviewed them prior to the time they took the Witness Stand. Direct examination was done blind. At that October 9th hearing, Mr. Gilder, Ms. Rutherford and Danny Ray Davis were present. Deidre Davis, the wife of the Defendant, and Rosetta Fier, the mother of the Defendant, were present. The Rule was not invoked. They sat in the Courtroom . Delap testified on October 9th that he did not know the victim; he did not know who was accused of killing the victim; he did not know the family

of the victim; that he lived in Arkabutla and to the best of his knowledge, the Defendant could receive a fair and impartial trial. There is nothing inconsistent with the testimony he gave on October 9, 1985 and his responses in voir dire on November 4th and November 5th, 1985.

THE COURT: Anything finally, Mr. Gilder?

COUNSEL FOR DEFENDANT (Mr. Gilder): No, sir, Your Honor.

THE COURT: The -- if I remember correctly, the motion as it was made was to quash the Jury and declare a mistrial. That motion is going to overruled. Now, if I have any good

points, it's certainly not -- one of them certainly not -- one of them certainly is not name recalled or name recollection, the name Ben Delap meant nothing to me, but when this matter was first brought up a while back here in Chambers and we started into this motion hearing, then I started looking at the notes that I have with me; the notes that I made back on October 9th at the motion hearing on the motion. As I recall, the first motion called up the morning of October 9th here at this Courthouse, was the Defendant's Motion for Change of Venue. Now, having the benefit of those notes, that I took here with me, I see that indeed there were eleven witnesses that I have with me; the notes that I made back on October 9th at the motion hearing or

the hearing on the motion. I believe there were some twenty-eight motions. As I recall, the first motion called up the morning of October 9th here at this Courthouse, was the Defendant's Motion For Change Of Venue. Now having the benefit of those notes, that I took here with me, I see that indeed there were eleven witnesses called by the State. I believe Mr. Kelly called out the names. Those are the names that I had, perhaps, -- I did have -- a couple of the names were different, but the last names were the same, in the same order, Witness Number 7, I have, was Ben Delap. According to my notes, he testified that he lived out at Kelley's Crossing at Arkabutla for about twenty years. He was retired from the automobile busines. He had worked in

Memphis for the most part during his years of employment with various automobile dealers, including Chuck Hutton, Bud Davis and Cohen, I believe. My notes indicate that he said that he had heard about the Ralph May killing; that he had talked to about fifteen people since April. He'd really heard nothing about the case; that he was satisfied that the people of Tate County would be fair and truthful and they were church-going. This was on direct examination. On cross-examination, my notes reflect that he said that he did not know Mr. May. He was aware of the killing. The case had not been brought up or discussed. He had read one article in the paper. He did not take the Tate County Democrat and he had never heard

anything about this case on the radio. Now, I can't recall personally if Ben Delap sat out in the Courtroom or sat with or close to family members; members of the May family. As I recall -- my notes don't reflect it, but as I recall, the Rule was not invoked as to witnesses, in the motion -- at the motion hearing. I don't know if sitting on the same row with family members, if that took place, sitting behind them or sitting within a few feet of them; I don't know if that means that he intentionally sat with family members of not, but from what I recall his testimony being and what my notes reflect his testimony being, was on direct and cross examination on October 9 and his answers under oath that he gave to extensive voir dire

examination over two days, there is nothing inconsistent with what he said on October 9th and his responses to questions propounded during voir dire. If anything, there appears total consistency. Great leeway was afforded on voir dire examination when we started up Monday morning. We concluded with voir dire late yesterday afternoon. Actually, the open court voir dire examination concluded close to the noon hour, so in essence, there was one and one-half days of voir dire examination in open court. Again, looking at my notes on the October 9 hearing, Mr. Delap testified about hearing something about the killing; he testified about reading one article and it's totally consistent with what he said in response to voir dire

examination that he had read and heard about the case, but, again, I think I examined, the State's attorneys examined, the defense attorneys examined the entire Jury panel about their ability or inability to ~~fairly~~ and impartially decide the case, if they were on the Trial Jury, and lay aside anything they had heard or read, and give both the State and the Defendant a fair and impartial trial, to decide the case fairly and impartially decide the case, if they were on the Trial Jury, and lay aside anything they had heard or read, and give both the State and the Defendant a fair and impartial trial, to decide the case fairly and impartially, based solely on the evidence and the law, a very extensive voir dire examination.

I see nothing improper with this Juror being on the Trial Jury, after going through this extensive voir dire examination and being selected and agreed upon by both the State and the Defendant, notwithstanding the fact that maybe -- that he did come back in on October 9th in the Court, and took the Stand and testified under oath as to the fact that he felt like the people of Tate County would give this Defendant a fair and impartial trial. And, again, my notes reflect that he had simply heard about it and I'll be willing to let the record at the motion hearing speak for -- set out exactly what he said, but my notes show that he said he did not know Mr. May and for those reasons the motion is overruled.

COUNSEL FOR DEFENDANT (Mr. Gilder): Your Honor, then, comes now the Defendant at this time and moves the Court to strike the Juror, Benjamin Delap, from the panel and cites as reason therefor everything that has gone into the record already in support of the motion to -- for a mistrial.

THE COURT: Any response?

ASSISTANT DISTRICT ATTORNEY (Mr. Kelly): Yes, sir. The Court has made a factual determination. There is nothing new before the Court, but I believe the United States Supreme Court, Federal Courts, and Courts of the State of Mississippi recognize that exercise of peremptory challenges is an art and that they may or they may not

be used for whatever strategic value the attorney involved chooses. And, right now, the Court is confronted with a question of art, and I feel that Mr. Gilder's motion should be overruled.

THE COURT: Anything further?

COUNSEL FOR DEFENDANT (Mr. Gilder): No, sir.

THE COURT: For the reasons already stated into the record in ruling on the previous motion, the motion is overruled, and the only additional remark I would make, even though it's already in the record on at least one occasion, if not more, is that the Defendant exercised eleven peremptory challenges and the State exercised

eleven peremptory challenges. At the time Benjamin Delap was tendered by the State to the Defendant, he still had one peremptory challenge left.

COUNSEL FOR DEFENDANT (Mr. Gilder): Your Honor, at this time, we would respectfully move that the seated Jurors for trial list be made a part of the record in the case.

THE COURT: That is routinely done in every case, civil or criminal, and will be done in this case.

COUNSEL FOR DEFENDANT (Mr. Gilder): Your Honor, at this point, with that list being entered, again, I would like to make the statement that the last three Jurors that were tendered to the

Defendant yesterday, when we had one challenge left, was Ms. Jeanette Brents, Benjamin Delap and Robert G. Golden. The reason we accepted all three and didn't exercise our peremptory challenge was that Sidney Scott, who knew the widow or knew the family, was the next Juror, Number 62, which we felt the State would accept and as the art of using peremptory instructions, as Mr. Kelly said, we did not want Mr. Scott because he had acknowledged that, so, we took Mr. Delap as one of the three remaining Jurors instead and, in accordance with what we had figured, stragetically in preemptorily challenging, the State did accept Mr. Sidney Scott as an alternate and we did exercise one of our two challenges as an alternate to get him

off the Jury for that reason. So, that was the reason that the twelfth challenge was not used by the Defendant. And, of course, as I've already testified, we didn't know about Mr. Delap at that time or we would have much preferred Mr. Scott, somebody who acknowledged what his connection with the case was.

THE COURT: Okay. Anything further then before we go into open court?

[Transcript pp. 1567-1577]

IN CHAMBERS

(The following proceedings take place in Chambers, outside of the presence of the Jury. The Defendant is not present.)

COUNSEL FOR DEFENDANT (Mr. Gilder): Your Honor, at this time while we're in Chambers, the Defendant wanted to submit to the Court a certified copy of the sentence of Danny Davis in Cause No. 4428 in the Circuit Court of DeSoto County, Mississippi, and get a ruling by the Court on whether or not it would be admissible if we want to offer it into evidence, and we didn't want to do it in the Courtroom; we wanted to do it back here in Chambers.

THE COURT: You mean the actual sentence. Of course, I know what's

already been marked and placed into evidence was the showing the trial and the conviction and deferring sentencing or cominuing sentencing.

COUNSEL FOR DEFENDANT (Mr. Gilder): Yes, sir.

THE COURT: And, this is the actual sentence which was pronounced later on?

DISTRICT ATTORNEY (Mr. Williams): We have some objections. Number one, insofar as just technical objections are concerned, of course, not shown as an exhibit under the reciprocal response, but more importantly we have real problem with its relevancy. The statute says convictions for a crime involving violence or the threat of the

use of violence, and, of course, that's been introduced by the conviction, the sentence as we see it is irrevelant, could only -- I don't know for what purpose it could be used other than to -- I don't see where it's even proper mitigation at all, the fact that he has been sentenced.

ASSISTANT DISTRICT ATTORNEY (Mr. Kelly): Your Honor, I don't believe that is a proper item of evidence for this Jury to consider. This Jury is to reach its verdict based upon the facts relating to the offense of April 2, 1985 and mitigating circumstances as shown by the Defendant. If this Jury knows what the defendant's sentence was in the DeSoto County conviction, it would be -- it would avail the

defendant of the proposed argument that life imprisonment plus twenty years is all the punishment that anyone needs, when the real issue is should the Jury decide what the punishment for this crime should be and not couple that punishment with any punishment reflected in any other Court in any other case.

DISTRICT ATTORNEY (Mr. Williams): It might reduce their job in this case or lessen their responsibility and, of course, the Mississippi Supreme Court and the U. S. Supreme Court as recent as Caldwell has said, nothing should be said or done to the Jury that would lessen their responsibility for the job at hand and that's the law and, of course, and, you know, as we see it,

what's sauce for the goose is sauce for the gander, as has been said by our State Supreme Court.

THE COURT: Anything further?

COUNSEL FOR DEFENDANT (Mr. Gilder): Yes, sir, Your Honor, for the record I want to state, you know, what the Defendant's position is with reference to offering this particular item which is the sentencing order from DeSoto County. Your Honor, it -- the technical part as to why it was not a part of the exhibits in discovery. Of course, at that point the Defendant was taking the position that the conviction itself should not be a part of the record and to have shown this as an exhibit we were intending to offer into

evidence would have been contradictory to the position we took which is that aggravated assault, because of the fact that it occurred subsequent to this offense, was not proper. We realize that we've been overruled on that and we're not trying to re-argue that, we're just stating that that was our position as far as the conviction itself which is now a part of the record. The reason that we feel that the sentencing order is proper is that in this peculiar case, and I call it peculiar in the sense that it's from practically all other cases in the State of Mississippi in that it is a case where the Jury not only determines guilt but fixes punishment, which in the vast majority of the cases, of course, that's not

true; the Jury's not concerned with punishment, they're concerned only with the question of guilt or innocence and the matter of punishment is always left up to the Trial Judge in the case, but in this particular type case, the Legislature has seen fit to make punishment also the determination of the trier of the facts and we say that in all cases where a judge imposes punishment, it's certainly informed, or the Court's informed as to what other sentences that the Defendant coming before the Court has to serve, or has been sentenced to serve, and we feel like that the Court probably takes this into consideration, and, yet, in a case like this, we say that the Jury has to impose punishment, but, on the other hand, if we say they're not entitled to

know what the sentence was in a case that they've already been told is an aggravating circumstance, they may figure it's must more than an aggravating circumstance than it would be if they were informed that for that aggravating circumstance that man is already -- has already been sentenced to twenty years. When they're trying to weigh the aggravating circumstance of the conviction against any mitigating factors, that aggravating circumstances of this prior conviction may weigh much more heavily on their mind than if they're informed as to what the sentence was. So, we say there are dual reasons, they are the people who must decide the punishment in the case and for that reason should be informed as to other sentences, but

also in weighing the aggravating circumstance of the prior crime that will be submitted to them and prior conviction, they should also know what punishment went with it in order to determine how much weight they figure it should have as an aggravating circumstance as opposed to possible mitigating circumstances. For these two reasons, we feel it would be entirely proper in this case for the trier or the decider of punishment to have this evidence before them which is the sentence imposed on the conviction of aggravated assault in DeSoto County.

DISTRICT ATTORNEY (Mr. Williams): Judge, I -- may I say one other thing?

THE COURT: Alright.

DISTRICT ATTORNEY (Mr. Williams): I agree personally with Mr. Gilder that the sentencor, whether it be the Judge or the Jury, should have the benefit of available facts and knowledge and so forth.

THE COURT: May I interrupt right here and say I agree totally philosophically with what Mr. Gilder said that the sentencing Jury should be entitled to have the same information before it as a Sentencing Judge. Unfortunately, that seems to be contrary to the laws of the State of Mississippi, but [illegible].

DISTRICT ATTORNEY (Mr. Williams): I was going to say the same thing as the Court, in principle, I agree. If Mr.

Gilder feels so strongly about this, as he urges before this Court, then I'm sure he wouldn't object to the Jury being informed, not only of this sentence, but the fact that a life sentence carries the possibility of parole after a period of ten years, and if he agrees, as he so strongly urges, that the sentencor should have all available facts, then quite possibly we could strike a deal of sorts where I would withdraw my objection of that, if he would not object to the sentencor having available information that a life sentence in this case means eligibility or parole after ten. I would -- there's no way to know how he feels until he responds to that, but I would suspect that that would not be suitable for him, however, I can't

speak for him. In the event that that is not suitable. then it would appear at least to us that Mr. Gilder wants his cake and wants to eat it, too. I think that our State Supreme Court, quite frankly, wants the sentencor in a capital murder case blinded. For what reason, I can't -- I can't comprehend, it's above me and I recognize that they're all on a level way above any of us down here in the pit so to speak, but be that as it may, I think we are honorbound to follow their directives whether we personally agree with them or not, and applying their logic, whether it be preterlogical or not, I believe that they would hold if they are consistent that this is not proper information that should be developed for the Jury. Of course, how they will

rule is, quite frankly, speculative at this point in time, but I will have to say that if they follow the same logic that they used in keeping from the sentencor the fact of parole eligibility, then that same logic would at least to me exclude this offer of proof by the Defendant. Have I made my position clear, Your Honor?

THE COURT: Yes, sir.

COUNSEL FOR DEFENDANT (Mr. Gilder): Your Honor, I would say this that if we can explain to the Jury all the ramifications of parole, I wouldn't be opposed to it, but I wouldn't it done in a way to say that he's eligible in ten years with the implication that he's going to get paroled because

actually with this sentence, unless the Court runs the sentences concurrent, he wouldn't be eligible in ten years as I understand it, and I want to state, quite frankly, that I don't know that much about parole law or eligibility dates, but my understanding would be that -- that if he has this twenty years to serve with the last sentence consecutive, that there would be some other date that would even be an eligibility date, but, if the Jury had all those facts and knew that eligibility doesn't mean parole or that you're going to get paroled, I wouldn't have any problem with it, because I, quite frankly, think that everybody on the Jury knows that people with life sentences whether we tell them or not, don't have to serve the rest of their

natural life necessarily, that it's up to a different body than we're dealing with here, it's not up to any of us, and I think those people know that, but I don't know if they know how it works; they probably know about as much as I do about it, but even aside from the point, that Mr. Williams made, and I think it's a good point on behalf of the State, the argument he made, I still feel that if you get away from parole consideration completely unless we could sit down and really educate the Jury on that and what consecutive and concurrent sentences are and how they could affect parole eligibility, that still is a mitigating factor that to have a conviction and not know that there's been any sentence imposed, or what that sentence is, could give that

miti... -- I'm sorry, that aggravating circumstance more weight than it would normally be entitled to if they knew there had been a sentence. And, so for that reason alone without the other argument, the right of the sentencor to be completely informed, I still feel like that that one point alone would make it admissible evidence in this case.

THE COURT: Well, again, I'm going to -- I compelled to deny the request for these reasons. Number one, backing up what's already been stated by Mr. Gilder for the Defendant, and Mr. Williams and the Court are all in agreement that it would certainly be a better situation; it would be a fairer situation for the State and Defendant

for the Sentencing Jury to have the same information that a Sentencing Judge has, and, I think without having to say too much or having to put too much into a written instruction, the Jury could be very adequately informed regarding parole and who is responsible for parole and how that works and consecutive sentences and concurrent sentences and all of that, but the Supreme Court of Mississippi made it very clear that it is reversible error for -- for that type information to be given to the Jury, as I understand the law. So, hopefully being consistent with what I understand the present feelings of the Supreme Court to be. On the other hand, with what I have before me here, I feel like it's likewise equally contrary to the

present status of the law to allow the Sentencing Jury to be given information concerning the sentence which the Defendant received pursuant to the DeSoto County conviction. I think it's contrary to the case law and the sta[illegible]y esteem regarding aggravating and m[illegible]ting ~~circumstances~~ and what to consider. So, the request, having been made will be denied.

COUNSEL FOR DEFENDANT (Mr. Gilder): Your Honor, just for the record, could the record reflect that what we've been talking about was a certified copy of the Sentencing Order from DeSoto County [illegible] offered by Defendant?

THE COURT: Yes, sir. I have before me Sentence of the Court signed by Judge

Baker dated August 2, 1985, properly certified to by Jeanette B. Martin, Circuit Clerk of DeSoto County. There's no question about the authenticity of the document and the fact that this is a certified copy of the Sentencing Order in Cause NO. 4428, the conviction of which was previously been offered in the sentencing phase.

DISTRICT ATTORNEY (Mr. Williams): Judge, I have -- I have no objection to marking it at least for identification purposes and making it a part of the record.

COUNSEL FOR DEFENDANT (Mr. Gilder): That would be better. I would like to do that.

THE COURT: Okay. It will be marked for identification and placed under seal. It, of course, will not be given to the Jury, but it will be made a part of the record should the case have to -- should the case be appealed.